Supreme Court, U.S.
FILED
JAN 31 2000
CLERK

(4)

No. 99-672

In The

Supreme Court of the United States

KATHRYN I. BLANKENSHIP,

Petitioner,

v.

THE HONORABLE ALAN A. McDONALD, UNITED STATES DISTRICT COURT JUDGE, EASTERN DISTRICT OF WASHINGTON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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14pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

A. THE SOLICITOR GENERAL ACKNOWLEDGES THAT THERE IS A CONFLICT BETWEEN THE CIRCUITS AND HE RECENTLY ADVISED THIS COURT IN ANOTHER CASE THAT THE NINTH CIRCUIT'S CONSTRUCTION OF § 1985(2) IS ERRONEOUS 1

B. THE PRESENCE OF ANOTHER ISSUE WHICH THE NINTH CIRCUIT FAILED TO DISCUSS DOES NOT MAKE THIS CASE ANY LESS SUITABLE FOR RESOLUTION OF THE CIRCUIT CONFLICT ON THE QUESTION OF WHETHER SECTION 1985(2) AFFORDS A REMEDY TO NONPARTY WITNESSES 2

C. THE SOLICITOR GENERAL DOES NOT ADDRESS PETITIONER'S CONTENTION THAT THE NINTH CIRCUIT'S RATIONALE FOR REFUSING TO RECOGNIZE *BIVENS* ACTIONS IS INCONSISTENT WITH BOTH THE ELEVENTH AND EIGHTH CIRCUITS' DECISIONS.. 5

D. A DISTRICT COURT EEO PLAN CANNOT SERVE AS A CONSTITUTIONALLY ADEQUATE REMEDY FOR A CONSTITUTIONAL WRONG PERPETRATED BY THE DISTRICT COURT ITSELF 8

E. THE FACT THAT CONGRESS HAS PERMITTED THE JUDICIAL BRANCH TO MANAGE ITS OWN PERSONNEL MATTERS DEMONSTRATES THAT CONGRESS DID NOT INTEND TO PRECLUDE JUDICIAL EMPLOYEES FROM BRINGING *BIVENS* ACTIONS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Blankenship v. McDonald, 176 F.3d 1192 (9th Cir. 1999).....5, 6

Brever v. Rockwell Internat'l Corp., 40 F.3d 1119 (10th Cir. 1994)..... 1

Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)..... 8

David v. United States, 820 F.2d 1038 (9th Cir. 1987) 1

Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979)..... 7

Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997).....5, 7

Haddle v. Garrison, 525 U.S. 121, 119 S.Ct. 489, 142 L.Ed.2d 502 (1998)..... 1, 3, 4

Heffernan v. Hunter, 189 F.3d 405 (3d Cir. 1999)..... 1

Langley v. Adams County, Colorado, 987 F.2d 1473 (10th Cir. 1993)..... 1

Lee v. Hughes, 145 F.3d 1272 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 1026 (1999) 5, 10

Leistiko v. Secretary of the Army, 922 F.Supp. 66 (N.D. Ohio 1996), *affirmed*, 134 F.3d 817 (6th Cir. 1998)..... 7

Rylewicz v. Beaton Services, 888 F.2d 1175 (7th Cir. 1989)..... 1

Walker v. United States, 11 Ct. Cl. 77 (1986)..... 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. § 5596(b)(1) 6

5 U.S.C. § 6301(2) 6

5 U.S.C. § 6381 6

42 U.S.C. § 1985(2) 1, 3, 4

ARGUMENT IN REPLY

A. THE SOLICITOR GENERAL ACKNOWLEDGES THAT THERE IS A CONFLICT BETWEEN THE CIRCUITS AND HE RECENTLY ADVISED THIS COURT IN ANOTHER CASE THAT THE NINTH CIRCUIT'S CONSTRUCTION OF § 1985(2) IS ERRONEOUS.

The Solicitor General admits that there is a split in the circuit courts on the issue of whether 42 U.S.C. § 1985(2) affords a remedy to a nonparty witness, acknowledging that the more recent decisions of the Third and Tenth Circuits have rejected the Ninth and Seventh Circuits' view that only a witness who is also a party litigant can bring suit under the statute. *Brief in Opposition to Certiorari*, at pp. 5-6. *Compare Heffernan v. Hunter*, 189 F.3d 405, 409-11 (3d Cir. 1999); *Brever v. Rockwell Internat'l Corp.*, 40 F.3d 1119, 1125 (10th Cir. 1994); and *Langley v. Adams County, Colorado*, 987 F.2d 1473 (10th Cir. 1993); with *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987) and *Rylewicz v. Beaton Services*, 888 F.2d 1175, 1180 (7th Cir. 1989).

But the Solicitor General fails to mention the fact that in his *Brief for the United States as Amicus Curiae Supporting Petitioner* submitted to this Court in *Haddle v. Garrison*, 525 U.S. 121, 119 S.Ct. 489, 491, n.3, 142 L.Ed.2d 502 (1998), he advised this Court that the United States believed that the Ninth Circuit's position was incorrect. In that brief the Solicitor General urged this Court to reject respondent Garrison's contention that Haddle could not bring a § 1985(2) action because he was not a party witness:

> [R]espondents suggest that Section 1985(2) (clause i) provides a remedy in damages only for parties to litigation. Although the remedy clause (Section 1985(3) (clause iii) uses the term "party" when it describes who may sue for damages under the statute, that term is used as a synonym for "person" and is not intended to restrict actions for damages to parties to a court proceeding. *See Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 & n.7 (10th Cir. 1994). Because the remedy clause applies to

> actions based on all the conspiracies prohibited by Section 1985, most of which do not even involve court proceedings, reading "party" as limited to a party to a judicial proceeding would vitiate the statute. In fact, as enacted, the statute used the word "person" rather than "party." *See* 17 Stat. 14 (reprinted at App., *infra*, 5a). The substitution of the term "party" occurred when all federal statutes were consolidated in the Revised Statutes, and as explaining at note 2, *supra*, the consolidation was not intended to change the meaning of the statutes.

Brief for the United States as Amicus Curiae Supporting Petitioner, 1998 WL 430030, at 47, n.27.

Thus the Solicitor General does not and cannot argue that the decision below is correct.

B. THE PRESENCE OF ANOTHER ISSUE WHICH THE NINTH CIRCUIT FAILED TO DISCUSS DOES NOT MAKE THIS CASE ANY LESS SUITABLE FOR RESOLUTION OF THE CIRCUIT CONFLICT ON THE QUESTION OF WHETHER SECTION 1985(2) AFFORDS A REMEDY TO NONPARTY WITNESSES.

The Solicitor General, acting solely in his capacity as counsel for the individual respondents, and not as counsel for the United States, suggests that "this case does not . . . present a suitable vehicle for resolving the conflict on the question whether the statute provides a remedy to a nonparty witness," because there is another issue in the case which the Circuit Court did not discuss. Section 1985(2) applies to testimony given before a "court of the United States." Despite the uncontested facts that petitioner Blankenship was placed under oath by a United States District Court Judge, and that she gave her testimony in a United States courtroom located inside a United States federal courthouse, the Solicitor General suggests that Blankenship has no cause of action because "[t]he statute applies only to testimony before a 'court of the United States.' " *Brief for the*

Respondents in Opposition, at p. 6.[1] Therefore the Solicitor General argues that even though the Ninth Circuit's decision based on the construction of the word "party" is erroneous, and even though there is a split in the Circuits on this important question, this Court should not take this case to resolve the conflict because ultimately Blankenship cannot win this lawsuit.

The logic of the Solicitor General's position is obviously flawed. Whether or not Blankenship will ultimately lose her lawsuit because the District Court Judge she testified before was not a "court of the United States" is immaterial to the question of whether her case presents an apt vehicle for resolving the conflict as to whether a nonparty witness has a cause of action under Section 1985(2). This Court can and should grant certiorari to resolve that conflict. If, after resolving it, this Court agrees with Blankenship that a nonparty witness does have an action under Section 1985, then this Court can do one of two things.

One option would be to simply remand the case to the Ninth Circuit for further consideration, thus allowing the Circuit Court to resolve the issue of whether testimony before a U.S. District Court Judge in a United States Courthouse constitutes testimony in a "court of the United States." This is precisely the approach this Court took in *Haddle v. Garrison, supra.* In *Haddle* this Court granted certiorari to resolve a conflict on one issue involving Section 1985(2), took note that there were two other issues, one of which was the very same issue which is now presented by this case, reversed the Circuit Court and remanded for further consideration on the remaining issue:

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[1] The Solicitor General's strategic and adversarial placement of quotation marks obscures the fact that the word "before" does not appear in the statute. The actual operative language refers to conspiracies directed against "any party or witness *in* any court of the United States from attending such court, or from testifying to any matter pending therein." It is not disputed that physically Blankenship was "in" a United States courthouse when she gave her testimony.

> We express no opinion regarding respondents' argument that intimidation claims under Section 1985(2) are limited to conduct involving force or threat of force, or their argument that only litigants and not witnesses, may bring Section 1985(2) claims. **We leave those issues for the courts below to resolve on remand.**

Haddle v. Garrison, 119 S.Ct. at 491, n.3 (emphasis added).

The second option would be for this Court to decide the remaining issue itself. Neither the Circuit Court nor the District Court even bothered to discuss respondent McDonald's contention that the testimony that Blankenship gave before Judge Quackenbush was not testimony "in a court of the United States." From this one could infer that the lower courts thought this argument was wholly without merit.

If there is a factual point to be made, it is simply that the District Court was not conducting the business of a lawsuit pending before it when Blankenship's testimony was taken. But the clear language of the statute states that the witness need not be testifying in connection with a lawsuit. The statute prohibits conspiracies to deter "any party or witness in any court of the United States from attending such court, or from testifying ***to any matter pending therein***, freely, fully, and truthfully . . . " 42 U.S.C. § 1985(2) (emphasis added).

Blankenship's testimony was given to a District Court Judge who was handling an internal grievance filed by a deputy clerk. While the grievance may not have been a lawsuit, it was obviously "a matter pending" in the District Court. And the District Court Judge who presided over that matter did not suddenly cease to be a District Court Judge exercising the power of a court of the United States. The respondents' lame contention that the statute only covers testimony given in connection with a lawsuit is belied by the express wording of the statute which encompasses *"any matter pending"* in a federal court.

The Solicitor General cites cases in support of the proposition that 1985(2) "does not encompass testimony given at

an administrative proceeding." *Brief for Respondents in Opposition*, at p. 6. Of course *none* of the cases cited involved testimony given before a United States District Court Judge, or any other judicial officer.

In sum, this Court could choose to simply address this additional issue itself, or it could choose to leave it to the Ninth Circuit to resolve on remand. But in either event, the presence of this additional strained contention of respondents provides no reason why this Court should not resolve the conflict among the circuit courts on the issue of whether Section 1985(2) affords a remedy to nonparty witnesses.

C. THE SOLICITOR GENERAL DOES NOT ADDRESS PETITIONER'S CONTENTION THAT THE NINTH CIRCUIT'S RATIONALE FOR REFUSING TO RECOGNIZE *BIVENS* ACTIONS IS INCONSISTENT WITH BOTH THE ELEVENTH AND EIGHTH CIRCUITS' DECISIONS.

In *Lee v. Hughes*, 145 F.3d 1272, 1275-76 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 1026 (1999), the Eleventh Circuit declined to address the EEO Plan/Back Pay Act theory advanced by both the judicial employer in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997) and by the respondents in this case, and held instead that in light of Congress' intentional omission from the Civil Service Reform Act ("CSRA") of *any* statutory remedy for constitutional wrongs suffered by federal court employees, the courts should decline to recognize the existence of a *Bivens* action. The Eleventh Circuit found it "troubling" that judicial employees had no remedy whatsoever for constitutional wrongs, but felt that the separation of powers doctrine required courts to defer to Congress on this point. *Id.* at 1276.

In the present case, however, the Ninth Circuit held that the CSRA precludes a *Bivens* remedy due to the existence of other benefits and remedies which show that "the lack of more complete remedies was not inadvertent." *Blankenship v. McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999). Thus the two decisions are inconsistent. One recognizes that judicial employees have no remedies at all, the other opines that they

do have some "remedies" but that they are somehow simply "less complete" than they could be.

Moreover the Ninth Circuit was less than clear about the source of Blankenship's "less than complete remedy." The Ninth Circuit mentioned the CSRA, but did not actually mention either the Back Pay Act or District Court EEO plans, even though respondents' entire argument in the District Court was that the combination of the Back Pay Act and the EEO Plan for the District Court of the Western District of Washington sufficed to give Blankenship a constitutionally adequate remedy.

The Ninth Circuit did state: "Congress has given judicial employees certain employment benefits and remedies, such as *back pay*, severance pay, family and medical leave, and health and retirement benefits." *Blankenship*, 176 F.3d at 1195. *None* of these benefits, however, were extended to judicial employees by the CSRA. The family and medical leave benefits are attributable to the Family and Medical Leave Act, 5 U.S.C. § 6381 and the Federal Employees Family Friendly Leave Act, 5 U.S.C. § 6301(2). The retirement, health insurance and life insurance benefits were granted pursuant to still other statutes. Moreover, all of these benefits are irrelevant to the issues presented by this case, since *none* of them give a judicial employee the right to contest his or her discharge. Benefits are not "remedies"; the purpose of benefits is not to rectify a wrongfully inflicted injury.

The Back Pay Act does provide for a remedy. But it provides that back pay can be awarded *only* when the employee "is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement to have been affected by an unjustified or unwarranted personnel action" which led to a loss of compensation. 5 U.S.C. § 5596(b)(1). Thus standing alone the Back Pay Act provides Blankenship and other judicial employees with no remedy at all. Unless they can find some "appropriate authority" which can decide under some other "applicable law, rule [or] regulation" that their discharge was unjustified, they still have no remedy at all. *Walker v. United States*, 11 Ct.

Cl. 77 (1986); *Leistiko v. Secretary of the Army*, 922 F.Supp. 66, 75 (N.D. Ohio 1996), *affirmed*, 134 F.3d 817 (6th Cir. 1998).

Respondents argued in the District Court that a District Court Judge's decision in an EEO grievance proceeding in favor of a judicial branch employee premised upon a substantive provision of the EEO Plan, would amount to the required finding by an "appropriate authority." But the Ninth Circuit's decision in this case doesn't mention the District Court's EEO plan for handling internal court grievances, even though such a proceeding was the *only* mechanism that respondents identified as a possible trigger for favorable Back Pay Act relief. Thus the only relevant "less than complete remedy" for the redress of an unconstitutional discharge of a judicial branch employee depends on the existence of an internal grievance procedure in a judicial EEO Plan which includes a provision authorizing the reinstatement of a discharged employee.

But it is illogical to infer that *Congress* intended for an internal judicial EEO Plan to preclude a *Bivens* action. Such EEO plans are not Congressionally mandated. Judicial EEO plans are adopted by courts, not by Congress. Since they do not constitute "congressional action" at all, they are not probative of Congressional intent in the least.

In *Duffy* the Eighth Circuit specifically held that a *judicial* EEO plan could not be read as demonstrating a *Congressional* intent to limit judicial employees to whatever administrative remedies were provided in those plans so as to justify the conclusion that Congress meant to preclude a *Bivens* action. *Duffy*, 123 F.3d at 1034. Thus in addition to conflicting with the CSRA rationale underlying the Eleventh Circuit's decision in *Hughes*, it also conflicts with the rationale and the result of the Eighth Circuit's decision in *Duffy*. *See, Petition*, at 17-18. The Solicitor General's response does not address these inconsistencies and conflicts between the Circuit Courts' decisions.

The Solicitor General also argues that Petitioner's reliance on *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) is misplaced, because this Court did not address the preclusive effect of the CSRA enacted only a few

months before *Davis* was decided. However, the rule of *Davis* remains valid: In the absence of an explicit declaration that a certain class of persons may not recover for discrimination claims, the mere fact that Congress leaves some employees with no statutory remedies does *not* preclude a *Bivens* claim. The Solicitor General argues that unlike petitioner, the plaintiff in *Davis* had no remedial mechanism available. As argued above, petitioner has no *congressionally-enacted* remedial process available to her, and thus the courts should not infer that Congress meant for her to have no judicially recognized *Bivens* remedy either.

D. A DISTRICT COURT EEO PLAN CANNOT SERVE AS A CONSTITUTIONALLY-ADEQUATE REMEDY FOR A CONSTITUTIONAL WRONG PERPETRATED BY THE DISTRICT COURT ITSELF.

In *Bush v. Lucas*, 462 U.S. 367, 378, n.14, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), this Court reserved the question of "whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right." The Solicitor General argues that petitioner had an adequate remedy to vindicate her constitutional rights by seeking review of her retaliation claim through the administrative EEO process adopted by the district court at the direction of the Judicial Conference. The Solicitor General contends that the EEO process is adequate because it provides for appointment of an impartial investigator and a designee to fulfill the duties of the Chief Judge. *Respondents Brief*, at p. 12, & n.5.

Nevertheless, the EEO Plan is not constitutionally-adequate, because its implementation depends solely upon the unreviewable conduct of the Chief Judge, who issues the final decision. In this case the Chief Judge was one of the three judges who fired Blankenship. EEO Plan guidelines for appointment of an impartial investigator and designee for the Chief Judge can be ignored by the Chief Judge with no redress. Further, the EEO Plan is not a congressionally-enacted remedy. Its continued existence and provisions are at

the discretion and within the power of the Judicial Conference and the district court. It could be eliminated at any time *without* any congressional decision or action. This is not the constitutionally-adequate remedy contemplated in *Bush*.

E. THE FACT THAT CONGRESS HAS PERMITTED THE JUDICIAL BRANCH TO MANAGE ITS OWN PERSONNEL MATTERS DEMONSTRATES THAT CONGRESS DID NOT INTEND TO PRECLUDE JUDICIAL EMPLOYEES FROM BRINGING *BIVENS* ACTIONS

Respondents note the exclusion of court personnel from the coverage of Congressional statutes pertaining to discrimination and employment can be traced to a Congressional desire not to interfere in the internal affairs of the judiciary. "In the main, Congress has permitted the judicial branch to manage its own personnel matters." *Brief for the Respondents in Opposition*, at 11. Respondents point to the commentary to Congress' decision to remove the employees of the Administrative Office of the United States Courts from the CSRA, where "Congress explained that the 'separation of powers' counseled that the judicial branch should be 'mostly free' of executive branch supervision of its personnel matters." *Id.* Respondents argue that these "decisions reflect Congress's determination regarding the appropriate balance between respect for the independence of the judicial branch and protection of the rights of judicial branch personnel." *Id.* at p. 12.

Respondents fail to realize that Congressional recognition of the independence of the judicial branch, and a Congressional desire to let the judiciary manage its own personnel affairs, actually *contradicts* the position they have taken in this case. The contention that Congress meant to *forbid* the courts from recognizing the availability of a *Bivens* action to a judicial branch employee is completely inconsistent with the contention that Congress meant to *recognize judicial independence*. Congress cannot simultaneously intend to leave the judiciary free to regulate its own personnel

matters, and also intend to prohibit the courts from entertaining *Bivens* suits brought by judicial branch employees.

In *Hughes* the Eleventh Circuit held that given "the long-respected separation of powers doctrine" the judiciary was compelled to decline to authorize a constitutional remedy since "Congress has intentionally withheld one." *Hughes*, 145 F.3d at 1276. And yet the Solicitor General maintains in this case that Congress has been trying to defer to the courts in this area, out of respect for the independence of the judiciary.

In sum, from the admitted fact that it has deliberately left the judiciary "mostly free" to manage its own personnel affairs, it is far more logical to conclude that Congress did *not* intend for its exclusion of judicial branch employees from the CSRA to have the effect of signalling to the judiciary that it did not want the courts to recognize the viability of a *Bivens* remedy for constitutional wrongs.

CONCLUSION

For these reasons petitioner Blankenship asks this Court to grant certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DATED this 28th day of January 2000.

Respectfully submitted,

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